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STATE OF MICHIGAN
IN THE SUPREME COURT

TAXPAYERS FOR MICHIGAN CONSTITUTIONAL GOVERNMENT, STEVE DUCHANE, RANDALL BLUM, and SARA KANDEL,

Plaintiffs-Appellees,

v

STATE OF MICHIGAN, DEPARTMENT OF TECHNOLOGY, MANAGEMENT AND BUDGET, and OFFICE OF AUDITOR GENERAL,

Defendants-Appellants.
_____/

Supreme Court No. _____

Court of Appeals No. 334663
Original Action

STATE OF MICHIGAN, DEPARTMENT OF TECHNOLOGY, MANAGEMENT AND BUDGET, AND OFFICE OF AUDITOR GENERAL'S APPLICATION FOR LEAVE TO APPEAL

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RECEIVED by MSC 12/10/2019 4:50:45 PM

TABLE OF CONTENTS

RECEIVED by MSC 12/10/2019 4:50:45 PM

RECEIVED by MSC 12/10/2019 4:50:45 PM

INDEX OF AUTHORITIES

Other Authorities

Rules

Constitutional Provisions

RECEIVED by MSC 12/10/2019 4:50:45 PM

RECEIVED by MSC 12/10/2019 4:50:45 PM

STATEMENT OF JURISDICTION

The Michigan Court of Appeals' October 29, 2019 published decision, on reconsideration, found in favor of Plaintiffs as to Count IV of the complaint addressing the proper treatment of Headlee § 29 payments under Headlee § 30. A copy of the lower court's decision, including the dissenting opinion on the matter raised in this application, is attached. The State defendants seek reversal of that part of the lower court's decision holding that state payments made pursuant to Headlee § 29 are excluded from the calculation required under Headlee § 30.

This Court has jurisdiction over the application for leave to appeal under MCR 7.303(B). The State defendants' instant application is timely filed within 42 days of the lower court's decision on reconsideration.

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STATEMENT OF QUESTIONS PRESENTED

Section 30 of Article 9 of Michigan's 1963 Constitution provides:

> The proportion of total state spending paid to all units of Local Government, taken as a group, shall not be reduced below that proportion in effect in fiscal year 1978-79.

The plain text of the Constitution requires that "total state spending" to local governments means exactly what it says: "total"—not something less. The lower court, contrary to the plain text, held that State payments made to local units of government in order to comply with Headlee § 29 must be excluded from the calculation under Headlee § 30. Section 29 of Article 9 of the Michigan Constitution requires that, if the State (Legislature, Executive Department, etc.) creates a new or increased level of local activity (i.e., creates a local mandate) then the State must pay for the increased costs of that activity from State funds.

1. Taxpayers' claims (and the Court of Appeals' opinion) involve the interplay between §§ 29 and 30 of the Headlee Amendment, an interplay that will affect all future Headlee litigation. Further, the Court of Appeals' decision reorders constitutional powers and usurps legislative authority over state tax revenue. Does the Court of Appeals' opinion warrant this Court's review?

   Appellants' answer: Yes.

   Appellees' answer: Presumably No.

   Trial court majority's answer: Did not answer.

2. Did the Court of Appeals err when it held that state payments from state funding sources paid to local units of government to satisfy state obligations under Headlee § 29 must be excluded from the Headlee § 30 "total" calculation?

   Appellants' answer: Yes.

   Appellees' answer: Presumably No.

   Trial court majority's answer: No.

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3. The Auditor General reviews and determines how state funds are spent and examines whether the State properly accounts for spending to units of local government. The Court of Appeals' opinion did not expressly address the issue of mandamus against the Auditor General but may imply that its review and determination under existing laws were subject to mandamus relief. Would mandamus relief as to the Auditor General, based on the claims raised for the first time in this case, i.e., despite no prior court decision that its processes were contrary to law, represent clear error?

Appellants' answer:	Yes.
Appellees' answer:	Presumably No.
Trial court majority's answer:	Did not directly answer.

RECEIVED by MSC 12/10/2019 4:50:45 PM

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Const 1963, art 9, § 25:

> Property taxes and other local taxes and state taxation and spending may not be increased above the limitations specified herein without direct voter approval. The state is prohibited from requiring any new or expanded activities by local governments without full state financing, from reducing the proportion of state spending in the form of aid to local governments, or from shifting the tax burden to local government. A provision for emergency conditions is established and the repayment of voter approved bonded indebtedness is guaranteed. Implementation of this section is specified in Sections 26 through 34, inclusive, of this Article.

Const 1963, art 9, § 29:

> The state is hereby prohibited from reducing the state financed proportion of the necessary costs of any existing activity or service required of units of Local Government by state law. A new activity or service or an increase in the level of any activity or service beyond that required by existing law shall not be required by the legislature or any state agency of units of Local Government, unless a state appropriation is made and disbursed to pay the unit of Local Government for any necessary increased costs.

Const 1963, art 9, § 30:

> The proportion of total state spending paid to all units of Local Government, taken as a group, shall not be reduced below that proportion in effect in fiscal year 1978-79.

MCL 18.1303:

* * *

> (5) "Proportion" means the proportion of total state spending from state sources paid to all units of local government in a fiscal year, and shall be calculated by dividing a fiscal year's state spending from state sources paid to units of local government by total state spending from state sources for the same fiscal period.

RECEIVED by MSC 12/10/2019 4:50:45 PM

MCL 18.1304:

* * *

(3) "State spending paid to units of local government" means the sum of total state spending from state sources paid to a unit of local government. State spending paid to a unit of local government does not include a payment made pursuant to a contract or agreement entered into or made for the provision of a service for the state or to state property, and loans made by the state to a unit of local government.

MCL 18.1305:

(1) "Total state spending" means the sum of state operating fund expenditures, not including transfers between funds.

(2) "Total state spending from state sources" means the sum of state operating fund expenditures not including transfers between funds, federal aid, and restricted local and private sources of financing.

RECEIVED by MSC 12/10/2019 4:50:45 PM

INTRODUCTION

Seldom can a litigant credibly say that a matter is so critical as to impact the entire state budget, every state department, every local unit of government and taxpayer, and the Legislature's budget setting and law-making authority—in perpetuity. But that—and no less—is what is at stake in this matter. If it is allowed to stand, the Court of Appeals' determination, that mandate spending under § 29 of the Headlee Amendment cannot be counted for purposes of the § 30 calculation of state spending for local units of government, will forever alter the state budget process and the relationship between the state and local government. Worst of all, it will do so *despite*, not because of, the plain language of the Headlee provisions and the voters' intent.

And yet, "[t]he past is never dead. It's not even past." (Faulkner, *Requiem for a Nun* (New York: Random House, 1950), p 92.) For all of the past 40 years, the calculation of proportion of state spending to local units of governments—including the baseline level of 48.97%—has *included* payments to fund state mandates. That means that all of the § 29 mandate spending going back decades to Headlee's 1978 inception would also need to be recalculated, with uncertain impact on future state and local budgets and funding going forward. Under the lower court's decision, the very relationship between taxpayer and government—both state and local—would be fundamentally upended in a way the voters who enacted the Headlee Amendment never intended. In short, this case has significant public interest, and for this reason alone warrants review by this Court.

This case also presents legal principles of major significance, in three ways.

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First, this case represents a systemic Headlee challenge. Specifically, Taxpayers' claims in Count IV of the complaint and the Court of Appeals' decision on that claim implicate the relationship between §§ 29 and 30 of the Headlee Amendment—and a change in that relationship will affect all future Headlee litigation.

Second, the Court of Appeals' decision effectuates a reordering of constitutional powers and usurps legislative purse power over state tax revenue.

Third, and finally, the Court of Appeals' decision is clearly erroneous, will cause material injustice, and conflicts with this Court's Headlee Amendment jurisprudence. Specifically, the decision creates a judicial carve-out of § 29 mandate spending from "state spending from state sources" sent to local units of government. In so doing, the decision conflicts with this Court's decision in *Schmidt v Department of Education*, relies on *Judicial Attorneys*' discussion of a guarantee of a minimum level of funding for state mandates even though nothing in that discussion suggested that § 30 required a minimum level of unrestricted funding for local operations, and relies on an erroneous interpretation of the Headlee Amendment's drafters' notes (which support the State defendant's position).

For these reasons, the State defendants respectfully apply for leave of this Court to appeal the Court of Appeals' decision, and request that this Court reverse the determination that § 29 mandate spending cannot be included for purposes of the § 30 calculation.

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STATEMENT OF FACTS AND PROCEEDINGS

This case involves the Headlee Amendment to the Michigan Constitution, and implementing legislation, MCL 18.1301 *et seq*. and MCL 21.231 *et seq*. The Taxpayers' complaint challenged the State defendants' computations of state spending from state sources to local units of government under § 30 of the Headlee Amendment including Proposal A spending, payments to public school academies (charter schools), and payments made in compliance with Headlee § 29.[1] Taxpayers also sought mandamus concerning the reporting requirements of MCL 21.235 and MCL 21.241, which the State defendants did not dispute in substance. This application for leave to appeal seeks reversal of the lower court's decision as to the proper treatment of State payments made pursuant to § 29 and any implied mandamus or other relief as extended to the Office of the Auditor General.

The Headlee Amendment was born from Michigan's "taxpayer revolt"

In 1978, Michigan voters ratified a series of constitutional provisions collectively and commonly known as the Headlee Amendment. That vote was "part of a nationwide 'taxpayer revolt' in which taxpayers were attempting to limit legislative expansion of requirements placed on locals government" by "put[ting] a freeze on what [voters] perceived was excessive government spending" and at the

[1] Plaintiffs' Counts I and II, not under appeal here, concerned state funding for Proposal A and public school academies, respectively. These counts were decided in State defendants' favor. Judge Meter dissented as to the disposition of Plaintiffs' Count II. (*Taxpayers for Mich Constitutional Gov't v Dep't of Tech, Mgmt, & Budget*, ___ Mich App ___ (2019), 2019 WL 5588741 (METER, J., dissenting.)

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same time "lower[ing] their taxes both at the local and state level." *Durant v State Bd of Educ*, 424 Mich 364, 378 (1985).

The Headlee Amendment created a series of tax-limiting provisions, codified in Const 1963, art 9, §§ 25–34, that required voter approval for tax increases. The goal was to keep the size of government, and its ability to raise taxes, under direct taxpayer control. *Durant,* 424 Mich at 383.

To that end, § 26 keeps the size of state government in check by limiting the State's total revenue raised in relation to personal income (total income received by persons in Michigan from all sources as provided in Const 1963, art 9, § 33). If state revenues and other financing sources exceed the annual limit, the State must issue pro rata refunds. *Id*. Correlatively, local governments are constrained by § 31, which requires voter approval before a new tax may be levied or an existing tax may be increased.

Headlee anticipated the possibility of the State shifting funding responsibility (i.e., burden to raise taxes) for state obligations to local governments. *Durant*, 424 Mich at 379. Section 29 prevents this by requiring the State to fund newly created mandates. Any increases in the scope of existing services or newly created programs, activities, or services mandated by the State must be completely funded by an appropriation from state funds. Const 1963, art 9, § 29.

Headlee § 30 sets the minimum amount of state spending that must be made to units of local government. Since 1993, that minimum has been 48.97%. Nothing in the plain text of § 30 limits the categories of state spending that are included in

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"total state spending paid to all units of local government." Section 30 only requires that 48.97% of the State's total annual spending from state revenue sources take the form of aid to local units of government.

State Funded Mandates for Provision of Local Services

Each year, the State defendants must determine how much of the state's total spending is in the form of aid to local governments to ensure compliance with Headlee § 30. In fulfilling that requirement, the State defendants do not differentiate between payments to cover local expenses for fulfilling State-imposed mandates and funding that is for discretionary local use. They have always counted both in the § 30 "total."

The State defendants agree that state spending to locals to discharge the State's *own* obligations,[2] as well as other statutory carve-outs,[3] cannot be included as § 30 spending; they reaffirm that none of these categories of state spending has been improperly included for purposes of § 30, and Taxpayers' allegations are not about those forms of state spending. Instead, Taxpayers have alleged entitlement to a guaranteed level of no-strings attached, discretionary revenue-sharing to local

[2] See, e.g., *Oakland Co v Michigan,* 456 Mich 144 (1997), holding that State spending to a county to discharge what was, under state law, otherwise the State's responsibility was not local spending for Headlee § 30. Plaintiffs' transportation spending allegations, Count III of Taxpayers' complaint, exemplify this type of state spending and those claims were dismissed by stipulation.

[3] By law, federal funding is not included in either the numerator or denominator; § 30 calculates only state revenue sources, exclusive of certain "transfers between funds, federal aid, and restricted local and private sources" and considers how those resources are allocated between state and local purposes. MCL 18.1305.

RECEIVED by MSC 12/10/2019 4:50:45 PM

governments from State level tax revenues and seek to exclude from the § 30 calculation money the State spends to fund local obligations created by state law.

In its October 29, 2019 opinion on reconsideration, the lower court held that Proposal A and charter school funding are properly counted in the § 30 calculation but determined that § 29 mandate payments are not. On reconsideration Judge Stephen Borrello, penned a new dissenting opinion as to Count IV of the complaint, holding:

> Simply stated, there is nothing in the language of either § 29 or § 30 that prohibits the state from eliminating a state mandate and then shifting funds formally [*sic,* formerly] allocated to the eliminated mandate to satisfy the state's obligation under the Headlee Amendment to fund a new mandate or an increase in the level of a mandated activity or service from the 1978 base year so long as the total proportion of state spending paid under § 30 is not reduced by the shifting of funds. [*Taxpayers for Mich Constitutional Gov't*, ___ Mich App at ___, 2019 WL 5588741, *11 (BORRELLO, P.J., dissenting).]

The dissenting opinion held that "[s]ection 30 contains no language guaranteeing the exact composition of the funding, i.e., that the base level of funding guaranteed by § 30 must contain the same ratio of discretionary funding to restricted funding as existed in the 1978-79 fiscal year." *Id.* The majority held to the contrary; under the lower court's decision state spending from state revenue sources paid to local governments must be removed from the Headlee § 30 numerator if that spending is paid to fund a state mandated under Headlee § 29.

The State defendants apply for leave to appeal the Court's opinion as to § 29 state mandate funding. They likewise seek dismissal of the Auditor General and confirmation that mandamus as to the Auditor General is improper here.

RECEIVED by MSC 12/10/2019 4:50:45 PM

STANDARD OF REVIEW

Statutory interpretation and application of Michigan's Constitution are questions of law that this Court reviews de novo. *Ford Motor Co v Dep't of Treasury*, 496 Mich 382, 389 (2014); *In re Sanders*, 495 Mich 394, 404 (2014).

ARGUMENT

The lower court's decision as to Headlee § 29 spending and its treatment under § 30 creates a seismic, and legally unsupported, shift in Michigan public finance law. Specifically, the lower court held that "pursuant to §29," state spending to local units of government to provide "funding for new or increased state mandates may not be counted for purposes of §30." *Taxpayers for Mich Constitutional Gov't*, ___ Mich App at ___, 2019 WL 5588741, *1.

That decision rewrites the Michigan Constitution, creating new categories of required state spending, i.e., State spending to fund local prerogatives not mandated by state law. The lower court's decision subverts the foundational principles of the Headlee Amendments, which sought to give taxpayers control over tax increases and government spending.

This Court should grant the State defendants' application for leave to appeal the lower court's decision as to Const 1963, art 9, § 30 because:

- This matter is of utmost public concern and already does or will impact every taxpayer in this state, the entire state budget and budgeting process now and every year going forward, and every state department, agency, and local unit of government now and going forward. The net effect of the Court of Appeals' decision is also to strip voters of the control over taxation and spending that Headlee sought to strengthen. These questions warrant this Court's review under MCR 7.305(B)(2).

RECEIVED by MSC 12/10/2019 4:50:45 PM

- The decision involves legal principles of major significance to the state's jurisprudence, i.e., foundational Headlee Amendment principles/issues that could affect all future Headlee suits, and a restructuring of constitutional powers, including usurpation of legislative powers. These questions warrant this Court's review under MCR 7.305(B)(3).

- The decision of the Court of Appeals is clearly erroneous, will cause material injustice, and conflicts with a Supreme Court decision. These questions warrant this Court's review under MCR 7.305(B)(5)(a)–(b).

Any one of these reasons, standing alone, warrant granting the State defendants' application for leave to appeal. Collectively, and considering the legal principles set forth below, the lower court's decision is not only wrong but does significant harm to the public fisc, the protections afforded by the Headlee Amendment, and this State's constitutional jurisprudence.

I. This case presents a matter of significant public interest with statewide repercussions for state budgeting, revenue sharing, and voter control over taxation.

The lower court's decision as to Count IV will have a statewide impact. The plain language of Headlee § 30 proves the point; in fewer than 30 words it provides:

> The proportion of total state spending paid to all units of Local Government, taken as a group, shall not be reduced below that proportion in effect in fiscal year 1978-79.

The words "total state spending" and "all units of Local Government" could not be more broad or any clearer: this matter involves all state level government spending (an amount exceeding $55 billion annually) and every local government (including every public school, village, township, city, county, and other qualifying public entities). Each local government is, in turn, made up of individual taxpayers,

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each of which is a local taxpayer and a state taxpayer; every citizen-taxpayer of this state has a dual interest in local *and* state level taxing and spending.

Every dollar of state revenue—public funds raised through state level taxes and other state revenue sources—is subject to the Legislative budgeting process each year. Those state tax dollars are appropriated and disbursed to the designated state departments and local governments to be used for state or for local use. The lower court's decision reshapes that entire process, from the Legislature's annual budget process to disbursement and spending by state and local governments. Yet it does so without basis in the plain language of the State Constitution, Headlee implementing legislation, or this Court's caselaw. The lower court's holding runs contrary to well-established principles set forth in caselaw concerning the intent of the Headlee amendments. The decision also subverts and disrupts taxpayer control over taxation and spending by severing the tie between public decision-making as to an activity and raising tax revenue for that activity.

In short, the Court of Appeals' decision destroys the requirement that the level of government that creates or takes on a government activity is, ultimately, responsible for raising the revenue to fund that activity through approval at the pertinent (i.e., local or state) level of government. For these reasons, the decision has significant public interest and warrants review by this Court. MCR 7.305(B)(2).

A. This case will impact the entire state budget.

Setting aside the billions of dollars it represents, Headlee § 30 is, at its core, a simple fraction. The denominator is total state spending from state revenue sources

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each year. MCL 18.1305(2). The numerator is total state spending paid to local governments. MCL 18.1304(3). In essence, the fraction shows what percentage of the state's annual budget is spending to local governments. Within the entire set of Headlee Amendments, Const 1963, art 9, §§ 25–34, Headlee § 30 serves a single function: it sets a minimum fraction of the total state spending that the State must spend on local government. That fraction, converted to a percentage, is 48.97%.

When the lower court removed an entire block of state level spending from "total state spending," it did more than add language to Michigan's Constitution; the lower court's decision simultaneously changed the State's entire budgeting and appropriations process. The impact will continue in each annual budget cycle, undercutting Legislative authority, unless reversed by this Court. Payments that, for four decades, have been treated as falling within the plain language of "state spending paid to units of local government" under MCL 18.1304(3)—and, more importantly, "total state spending paid to all units of Local Government" under Article 9, § 30 of Michigan's Constitution—must now be treated differently and contrary to the plain language of the Constitution.

It is unclear what the new vocabulary for the new treatment should be; after all the word "total" means everything, not something less. And the plain language of § 30 does not say "except the following state spending." Nor does the Constitution provide that state spending is only considered under § 29 or § 30. Nothing indicates that the two are mutually exclusive provisions or that state spending used to remain in compliance with § 29—funded mandates—are not also

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part of "total state spending" paid to local government; the spending clearly falls within the plain language.

But if the word "total" in the numerator means something less than everything, should the word "total" in the denominator also mean something less than everything? In other words, is state spending to fund mandates to comply with Headlee § 29 completely excluded from § 30 calculation, numerator (as local spending) and denominator (as part of "total state spending")? This is one of many logistical and practical questions that may appear absurd but are now, for the first time, relevant. The answers may impact billions of dollars each year.

Regardless of how those questions should be answered, there is no question that the lower court's decision rewrites how state payments for ongoing (existing) mandates dating back 40 years and any newly enacted state mandates passed by the Legislature in future years must be accounted for under Headlee. This new math impacts decades of state spending paid to every local government in this State; all 83 counties, 257 villages, 1,240 townships, 100 cities, nearly 900 public schools, and every one of its nearly 10 million citizens, including the nearly 1.5 million public school students.

Finally, to say the lower court's decision is a systemic accounting change is an understatement. The state spending at issue is not specific to an activity or department—this is not just about one contained issue like this Court has seen in an "unfunded mandate" case involving a discreet education funding dispute (e.g., the *Adair* or *Durant* lines of cases). If Taxpayers prevail, *all* funded mandates

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under § 29 going back decades and forward in perpetuity, will not constitute state payments to local governments under Headlee § 30.

Every one of the State's 18 departments[4]—from Agricultural to Treasury—will be forced to change how it tracks and treats state spending. Those principal state departments, organized by subject matter and all with various codes for different expenditure types, interface directly with local governments to disburse state funds. The lower court's holding would have thousands of State civil servants deciding which part of "total state spending" paid to local governments must now be excluded from § 30's plain and clear language.

B. The Court of Appeals' decision upsets the Headlee Amendment's goal of making taxation subject to voter control.

Headlee's aim vis-à-vis taxation and voter control is clear: if locals want to take on voluntary activities, they must raise revenue. That Headlee requirement and supporting caselaw give local voters control over local taxes and local spending.

Likewise, if the State Legislature provides discretionary funding in year one but decides to end that funding in year two, instead tying what used to be discretionary funds to a new state mandate, voters still have control over taxing and spending; they can vote out their state level representatives. The level of government that requires spending—whether the state or a local by ordinance—

[4] Although Michigan's Constitution provides for as many as 20 principal state departments, there are currently 18.

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must, at the end of the day, pay for that activity. That direct line gives voters control.

Here, the lower court's decision fundamentally undermines Headlee's voter control mechanisms by subjecting taxpayers in one locality (Clinton County, for example) to taxation and state funding to other local units (Marquette County, for example) for local programs of choice. But this taxation and spending would occur without any say at the local level for the first locality (Clinton County, in this example). And for reasons discussed below (Section III.A), the Court of Appeals' decision not only upsets Headlee's voter control mechanism, but also conflicts with this Court's Headlee Amendment jurisprudence.

Accordingly, the lower court's decision undermines the Headlee Amendment's goal of preserving local control over state and local taxation and funding.

C. This case involves legal principles of major significance to the State's jurisprudence, i.e., a systemic Headlee challenge that affects the interrelationship of state and local government going forward, and legislative power over state tax revenue.

This case involves legal principles of major significance to this state's jurisprudence for two reasons.

First, courts have never before been asked to interpret the state's implementation and enforcement of the Headlee Amendment's entire framework of how revenue is shared between state and local governments and counted by the state to monitor its compliance with § 30.

Second, the Court of Appeals' decision facilitates a restructuring of constitutional powers, i.e., a usurpation of legislative authority.

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For these reasons, this case merits review by this Court. MCR 7.305(B)(3).

1. This case involves a systemic constitutional challenge, i.e., the interplay between §§ 29 and 30 of the Headlee Amendment that will impact future Headlee litigation.

This case requires the interpretation of the interplay between several constitutional provisions on state to local funding, which significantly impacts how statewide taxpayers will be burdened to fund local programs and services that only benefit a small subsection of the state population. But this case does not only involve constitutional provisions—it also animates the structural interplay of Headlee's cornerstone pieces. Prior case law has only dealt with specific Headlee sections and how the state has funded specific programs and services. This case challenges the entire framework; and the Court of Appeals responded by remaking the local aid model in a way that goes against a long line of Headlee jurisprudence and creates uncertainty with the state budget, continued compliance with § 30, and how the state will be able to maintain its own programs and services while staying in compliance with § 30. In other words, prior cases have dealt with Headlee's branches whereas *this case involves the trunk of the tree*.

The upshot of Taxpayers' systemic Headlee challenge and the Court of Appeals' decision is uncertainty that will invite a new line of Headlee litigation asking courts to act as the relief valve for local government's revenue needs, instead of the Legislature or the local government's own constituents. Future litigation will be necessary because the lower court's decision leaves open questions about how the State is supposed to calculate its § 30 proportion by excluding § 29 mandate

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spending. First, is the State required to exclude § 29 mandate spending from the § 30 calculation retroactively, meaning that § 29 funding for all mandates going back to Headlee's enactment must be excluded from the § 30 percentage in future budget cycles; or whether the lower court's opinion establishes a new baseline for 2019 and requires exclusion of funding for post-opinion new or increased mandates, only?

Second, must the State remove § 29 mandate spending from both the "total state spending to local units" numerator *and* the "total state spending" denominator, or merely the numerator? Both the numerator and denominator contemplate a § 30 proportion using *totals*, or aggregates of spending into single figures. The lower court's decision holds that the numerator "total" is not, for Headlee purposes, a true total; it does not include all funding that is, in fact, sent to local units (i.e., § 29 mandate spending). This casts into doubt whether the denominator "total" is also not to be understood as a true "total" for Headlee purposes; if the numerator "total" under § 30 has a carveout for § 29 mandate spending, does the denominator also have the same carveout?

These open questions invite future Headlee litigation moving into uncharted territory because the lower court utilized post ratification drafters' notes, that this Court has already held are not authoritative,[5] to contradict Headlee's clear

[5] In deciding claims involving Headlee § 29, and "[i]n light of all of the contrary evidence previously discussed and of the fact that our attention is drawn to inconsistencies within the notes themselves," this Court found "the Drafters' Notes of no value . . . ." *Durant*, 424 Mich at 382 n 12.

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language that § 30 does not exclude any category of state spending paid to local governments to be excluded from the proportion. Including all categories of state spending to local governments makes sense in light of Headlee's overarching goals, limiting the size of government and giving the citizens control over both state and local taxation. The lower court's decision flips Headlee's goal on its head and instead increases the size of local governments without the need for local voter approval, at the expense of statewide taxpayers.

Further, the lower court's decision turns the State into a local government surety with state taxpayers now obligated to fund local governments for discretionary activities that will only benefit the small subset of taxpayers living within the local government's jurisdiction. Not only is this result contrary to Headlee's clear language, it does not make sense considering Headlee's goals to limit the size of government and give the people the power to approve new or increased taxes. *Durant*, 424 Mich at 364.

Instead of giving the constituents of each unit of government the power to approve or disapprove of new or increased tax revenue, the lower court's interpretation of Headlee's framework allows local governments to sidestep its own constituents and burden statewide taxpayers for local discretionary programs and services. Now, when a local unit of government needs new revenue to build a new park, fix municipally owned roads, or build a new recreation center, instead of asking its own constituents to pay for it, the local government will simply turn to the State. If the Legislature says no, then the local government will turn to the

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courts. This will result in increased burdens on taxpayers statewide, increased Headlee litigation, and usurp the Legislature's authority to allocate and share state revenue with local units of government as it deems fit through the political process.

2. The lower court's decision usurps the Legislature's authority.

The power of the purse for state level tax revenue "is the exclusive domain of the Legislature." *Employees and Judge of Second Judicial Dist Court, Second Div v Hillsdale Co*, 423 Mich 705, 739 (1985). Although that authority is "not absolute," separation of powers makes any intrusion on the Legislature's authority narrow. This narrow exception is consistent with the Michigan Constitution, which explicitly provides that "[n]o money shall be paid out of the state treasury except in pursuance of appropriations made by law." Const 1963, art 9, § 17. The Legislature is also empowered, explicitly, to "provide by law for the annual accounting for all public moneys, state and local, and may provide by law for interim accounting." Const 1963, art 9, § 21. Moreover, the "Legislature shall provide by law for the maintenance of uniform accounting systems by units of local government and the auditing of county accounts by competent state authority and other units of government as provided by law." *Id.*

Yet, here, the lower court's decision usurps the Legislature's exclusive authority in this realm without justification; the lower court invaded the Legislature's exclusive constitutional realm as to budgeting and appropriations not because of explicit constitutional authority to do so, but *despite* the plain language of Michigan's Constitution, specifically the plain language of Headlee § 30.

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Moreover, relevant caselaw addressing Headlee has explicitly held that in approving the Headlee amendments, Michigan voters did not intend to limit the Legislature's discretion or ability to be responsive to changing priorities and needs by changing laws and funding priorities by moving money that was once discretionary (i.e., not tied to a mandate but for local use/choice) in one year to cover state mandates in a subsequent year. The lower court's decision thwarts that Legislative discretion and flexibility. The decision makes the State Legislature responsible for funding local programs of choice over which the State has no control while upsetting the state-local funding ratio set forth in Headlee § 30.

II. The lower court's decision that Headlee § 29 spending is not included in § 30 constitutes clear error because it contradicts § 30's plain language and this Court's Headlee Amendment jurisprudence.

Section 30 counts total state spending to local governments that is raised from state-sourced revenues. There is no carve-out—legislative, constitutional, or otherwise—from the § 30 calculation for funds intended for local government use. In holding otherwise, the Court of Appeals misconstrued this Court's case law, erroneously relied on the Headlee Amendment drafters' notes, and in so relying, misconstrued the same.

For these reasons, the Court of Appeals' determination that § 29 mandate spending does not count for purposes of the § 30 calculation is clearly erroneous, will cause material injustice, and conflicts with Michigan Supreme Court case law. MCR 7.305(B)(5)(a)–(b).

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A. There is no such thing as "state spending intended for local use." Accordingly, § 29 mandate spending for new mandates must be counted for purposes of § 30, and the Court of Appeals' decision conflicts with this Court's decision in *Schmidt v Department of Education*.

The Court of Appeals held that spending under § 29 does not count for purposes of § 30. It reasoned as follows:

> If state spending to fund new state-mandates under § 29 may be included in the State's calculation of the proportion of total state spending paid to units of local government, taken as a group, under § 30, then § 29 state funding for new mandates would supplant *state spending intended for local use* and, thereby, allow funding for new mandates to serve two conflicting purposes, i.e., to fund new state mandates as well as to the 1978-1979 level of state funding to local governments. [*Taxpayers for Mich Constitutional Gov't*, ___ Mich App at ___, 2019 WL 5588741, *10–11 (emphasis added).]

But the phrase "intended for local use" is not found in Headlee, the enabling statutes, or relevant caselaw. The Court's holding otherwise suggests that *no* § 29 mandate payment may be included in any part of the § 30 calculation, thus creating a new sub-category of spending—required state spending to locals for discretionary purposes. This represents clear error and conflicts with this Court's Headlee Amendment jurisprudence.

Specifically, in *Schmidt v Department of Education,* 441 Mich 236 (1992), in deciding the proper formulation for state funding to local units under Headlee § 29, the Michigan Supreme Court rejected any requirement that the State support local "programs of choice:"

> The question is not whether the local districts will be forced to raise local taxes to support their programs of choice, it is whether the state may mandate programs for which it does not pay a proportionate share. [*Schmidt*, 441 Mich at 260.]

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Schmidt, like the instant case, involved Headlee litigation between two levels of government. The *Schmidt* Court recognized that "the [Headlee] voters intended neither to freeze legislative discretion nor to permit state government full discretion in its allocation of support for *mandated* activities or services . . . ." *Id.* at 242 (emphasis added). The State has a duty to continue funding ("a minimum funding guarantee") existing state mandated services *and* a duty to fund new state *mandated* activities and services. *Id.* at 243.

Schmidt, like the drafters' notes, also confirms that discretionary state funding is not required, because the Headlee voters knew that:

> Having placed a limit on state spending, it was necessary to keep the state from creating loopholes either by shifting more programs to units of local government without the funds to carry them out, or by reducing the state's proportion of spending for "required" programs in effect at the time the Headlee Amendment was ratified. [*Schmidt,* 441 Mich at 286, citing *Livingston Co v Dep't of Mgmt & Budget,* 430 Mich 635, 643 (1988).]

But the limitation applies to spending "required" by State mandate; nothing in Headlee took away the Legislature's discretion to cut or wholly eliminate State funding for local discretionary programs. Indeed:

> The plan clearly does not prohibit the reduction of the "state financed proportion . . . of any existing activity or service [not] required . . . by state law. [*Livingston,* 430 Mich at 644.]

An "existing activity or service [not] required by state law," discussed in *Livingston County*, is what *Schmidt* later called local "programs of choice" that must be funded locally. *Schmidt*, 441 Mich at 260. And if § 30's plain language does not require that the State provide local discretionary funds, then those funds

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have no guaranteed place in § 30, and, therefore, it is not legally or factually possible that they could be "supplanted" by counting § 29 mandate payments under § 30 as part of "total" state spending. (*Taxpayers for Mich Constitutional Gov't*, ___ Mich App at ___, 2019 WL 5588741, *10 (if § 29 spending is also counted under § 30 "state funding for new mandates would supplant state spending intended for local use.").) In other words, contrary to the Court of Appeals' decision, this Court's *Schmidt* determination makes clear that there is no conflict or *either-or* analysis between §§ 29 and 30. State mandate spending must be analyzed under both provisions independently, not one or the other. This makes each level of government responsible for its own spending decisions while respecting state legislative discretion. And only this application—the application used since Headlee was ratified nearly 40 years ago—faithfully implements the electorate's desired result by "link[ing] funding, taxes, and control." *Durant*, 424 Mich at 383.

In keeping with both goals, "the state is not prohibited from redirecting other revenue in the interest of equalization, nor is it required to maintain mandatory programs in perpetuity;" the State can control existing mandates through revision or repeal of state laws and thus control the state funding that followed that mandate. *Schmidt,* 441 Mich at 256. But nowhere does Michigan law require *any* amount of state "spending for local use."

Yet the lower court's decision now requires the State to fund local discretionary activities with state "spending for local use" under § 30 which, the Court held, does not include § 29 state spending. The result thwarts the voters'

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intention " 'to link funding, taxes, and control.' " *Id.* at 258, quoting *Durant*, 424 Mich at 383. Headlee was intended to "protect all local taxpayers from the need to increase taxes to pay for programs over which they lack control," i.e., state mandated activities. *Schmidt*, 441 Mich at 259. It also gave local voters control over local "programs of choice," requiring voter approval for new taxes. Const 1963, art 9, § 31.

Here, the State (and statewide taxpayers) have no control over local programs of choice, yet under the lower court's decision now the State (via statewide taxpayers) must fund some portion of those purely local programs of choice. *Schmidt*, citing *Durant*, rejected that interpretation as contrary to the Headlee voters' intent. *Id.* at 257–258, quoting *Durant*, 424 Mich at 383 ("It would be contrary to Headlee to 'force some taxpayers to supplement the school district budgets of others' when the 'supplementing taxpayers would have no control over how those funds would be spent . . .' ").

When Taxpayers claim that they may be forced to raise local taxes to pay for local discretionary activities when the State creates new funded mandates, the response is yes; that is exactly what Headlee requires as part of a *local political process* for funding *local priorities* and the *statewide political process* for funding *state mandated priorities*.

B. The Court of Appeals' reliance on the *Judicial Attorneys Association* case is misplaced.

In reaching its conclusion as to § 29 mandate spending, the Court of Appeals misapplied a core Headlee principle from *Judicial Attorneys Association v State*, 460

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Mich 590, 605 (1999). In *Judicial Attorneys*, this Court decided whether an activity that was new to a particular local unit, but otherwise had been performed by other local units in 1978, was a "new" mandate requiring full state funding or an existing service entitled only to a proportionate state share of funding equal to that afforded across all local units. *Id.* at 594. This Court concluded that it was the latter: if the activity had been performed by local units generally, but after 1978 was required of specific localities that had not provided that service, the state must fund the state proportionate share (under § 29's first sentence), not full funding (under the second sentence). *Id.* at 609–611.

Judicial Attorneys involved a court reorganization per 1996 PA 374 (Act 374), which abolished the Detroit's Recorder's Court, merged it with the Wayne County Circuit Court, and required the County and City to assume funding for the Circuit Court and District Court, respectively. *Id.* at 594. The plaintiff claimed that Act 374 imposed new court responsibilities that violated Headlee "because it places funding obligations on [Wayne County and Detroit] that they were not previously required to shoulder." *Id.*

This Court rejected that argument, finding that Act 374 did not mandate a new activity or increase the level of an existing activity. *Id.* at 611. The Court revisited its "state to local" funding formulation set forth in *Schmidt*—under which "the state is obligated to afford each unit providing the activity or service the same proportion of funding that the state provided on a statewide basis in the year that the Headlee Amendment was ratified." *Schmidt*, 441 Mich at 250. While the

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responsibilities placed on the County and City in *Judicial Attorneys* were "new" as to those specific localities, they were not new to Michigan's local units generally. *Judicial Attorneys*, 460 Mich at 597. In other words, local units had always funded their own local courts and the State paid a portion of judicial salaries. *Id.* Act 374 "simply requires the [City and County] . . . to do what the State required every local unit to do in 1978: fund the local district or circuit court . . . ." *Id.* at 609.

Accordingly, *Judicial Attorneys* struck the balance between "the dual goals of (a) preserving the Legislature's ability to enact necessary and desirable legislation in response to changing times and conditions and (b) guaranteeing a predictable level of minimum funding." *Id.* at 605. That balance had a concrete meaning in that case—(a) preserving the Legislature's ability to enact legislation in response to changing conditions (i.e., reorganizing a County court); and (b) guaranteeing minimum funding (i.e., the judges' salaries in reorganized courts).

But here, unlike *Judicial Attorneys*, the case does not involve legislative discretion to make changes to local government (e.g., restructuring courts), and does not implicate any question of guaranteed § 29 funding (e.g., court funding, judicial salaries). Thus, the balance struck in *Judicial Attorneys* has no concrete facts as context—and, therefore, no meaning in this case.

Further, neither § 29 nor § 30 is nullified or impaired when § 29 mandate funding is included in the § 30 calculation. (*Taxpayers for Mich Constitutional Gov't*, ___ Mich App at ___, 2019 WL 5588741, *10.) Both operate in tandem to

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ensure that the State pays for activities it requires local units to carry out, and that local voters are the relief valve when local units seek more revenues for *non-mandated* programs. This is confirmed by *Schmidt*, which makes clear that for purposes of § 29 mandate spending, "the question is not whether the local districts will be forced to raise local taxes to support their programs of choice." *Schmidt*, 441 Mich at 260 (rejecting the concern that "wealthier districts will be presented with the 'Hobson's choice' of raising taxes or cutting programs . . .").

C. The Court of Appeals erred by misapplying the drafters' notes in a manner that contradicts the plain language of the constitutional provisions at issue.

The Court of Appeals interpreted the drafters' notes for Headlee § 30 to "evince[] an intent that state-funding obligations arising from new § 29 obligations are to be paid in addition to § 30 revenue sharing" and held that § 29 payments are not to be included in the § 30 calculation. CITE to COA pg 10. That interpretation is incorrect. The drafters recognized that including § 29 spending for additional or expanded state mandates in the § 30 calculation "would tend to increase the proportion of total state spending paid to local government above that level in effect when this section becomes effective." (Drafters' Notes – Taxation Limitation Amendment (Proposal E, approved by the electors on November 7, 1978, as an

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Amendment to the Michigan Constitution of 1963), § 30, p 11.)[6] Yet, the lower court held that the payments must be excluded.

If that were so, additional state mandates *would have no effect* on the proportion of total state spending paid to local government. The fact that the drafters' notes make clear that such additional mandates would tend to *increase* the proportion of total state spending paid to local government supports the State defendants' position: additional state mandate payments must be included in the numerator in calculating the § 30 ratio.

This makes sense when read in conjunction with the plain language of § 30. Simply because a local government cannot use § 29 revenue for any purpose it deems fit, does not render it excludable from the § 30 "total" calculation. As the drafters further stated as to § 29:

> This section does not necessarily prevent the state from shifting funds from general and unrestricted revenue sharing to the funding of a state mandated activity, but it does prohibit shifting funds from state mandated programs unless the mandate for such programs is eliminated. [Drafters' Notes – Taxation Limitation Amendment (Proposal E, approved by the electors on November 7, 1978, as an Amendment to the Michigan Constitution of 1963), § 29, p 10.]

Reading the two notes together, the drafters recognized the state can meet its § 30 obligation with a combination of discretionary and nondiscretionary spending to local governments, in *total*. Section 30 measures and sets a baseline total ratio; it does not guarantee funding "for local purposes."

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[6] The drafters' notes were attached as Exhibit 7 to Plaintiff's Court of Appeals 09/07/2016 Brief in Support of Complaint to Enforce the Headlee Amendment pursuant to Const 1963, art 9, § 32.

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That conclusion is consistent with the fact that state mandate payments have *always* been included in the numerator for calculating the § 30 ratio: even for the base year calculation which refers to the year the Headlee Amendment passed, the numerator included both unrestricted revenue sharing with localities and state mandate payments to local units for pre-Headlee state mandates. That baseline included some unrestricted funding but made no guarantee it would continue; only mandate funding is guaranteed.

The plain language of § 30 and the drafters' notes show that Headlee was never intended to burden state-wide taxpayers for the specific wants of a specific local government. As this Court held in *Schmidt*:

> We emphasized in *Durant* that the two sentences of § 29 must be read together . . . . We further explained that "while voters were concerned about the general level of state taxation, they were also concerned with ensuring control of local funding and taxation by the people most affected, the local taxpayers." [*Schmidt*, 441 Mich at 257, citing *Durant*, 424 Mich at 383.]

The drafters' notes do not contradict the plain language of the Constitution, rather they support it consistent with *Schmidt*. If Proposal A and public school academy funding is included in § 30, then § 29 mandate funding must be included, too; "total" state spending to local governments means *total*, not something less.

In sum: Headlee's prohibition on tax shifts has always concerned § 29 mandates; the State cannot relieve its own budget by requiring localities to perform state mandated activities without paying for them. But a local government cannot do the inverse: require the State to fund local "programs of choice."

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III. To the extent that the Court of Appeals held that the Auditor General is subject to mandamus, this determination is clearly erroneous.

The Court of Appeals' opinion is unclear as to whether mandamus relief was granted as to the Office of Auditor General (OAG). But to the extent that the OAG is subject to the mandamus determination, this decision is clearly erroneous and must be reversed.

The OAG is responsible for reviewing the State Budget Office's Statement of the Proportion of Total State Spending from State Sources Paid to Units of Local Government ("Statement") and preparing an independent accountant's review report. In other words, the OAG reviews and determines how state funds are spent, and examines whether the Statement properly accounts for spending to units of local government. The OAG then concludes whether or not material modifications to the Statement are necessary.

Mandamus relief as to the OAG is inapposite. If this Court determines that the State's § 30 calculation methods and procedures have been incorrect, then the OAG will conform its reviews and audits to those procedures and interpretations that the Court prescribes. The OAG submits that mandamus relief as to its procedures would be appropriate only in the event that it did not comply with this Court's determination as to the question of whether the State's § 30 calculation is proper.

For these reasons, the Court of Appeals' decision is clearly erroneous, would result in material injustice, and conflicts with this Court's Headlee Amendment jurisprudence, and review by this Court is warranted. MCR 7.305(B)(5)(a)–(b).

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CONCLUSION AND RELIEF REQUESTED

The Court of Appeals erroneously concluded that § 29 mandate spending cannot be counted for purposes of the § 30 calculation. If allowed to stand, the Court of Appeals' opinion will impact the state's jurisprudence, Constitution, budget, and public fisc, and will disrupt the relationships between state and local governments, and between those governments and taxpayers.

Accordingly, the State defendants respectfully requests that this Court grant this application for leave to appeal and determine that § 29 mandate spending is what it is as a matter of law, i.e., state spending from state revenues paid to local units of government.

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